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NO. 84-739

IN THE UNITED STATES SUPREME COURT

OCTOBER TERM, 1984

SEVERO PASILLAS,

Appellant,

vs.

AGRICULTURAL LABOR RELATIONS BOARD,

and

UNITED FARM WORKERS OF AMERICA, AFL-CIO,

Appellees.

ON APPEAL FROM THE CALIFORNIA COURT OF APPEAL, FIRST APPELLATE DISTRICT

MOTION OF APPELLEE AGRICULTURAL LABOR RELATIONS BOARD TO AFFIRM

DANIEL G. STONE
Solicitor of the Board
NANCY C. SMITH
Deputy Solicitor
CATHY A. CHRISTIAN
Deputy Solicitor
AGRICULTURAL LABOR RELATIONS BOARD
915 Capitol Mall, Third Floor
Sacramento, CA 95814
Telephone: (916) 322-7021

Counsel of Record for Appellee
Agricultural Labor Relations Board

#1450

3114

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915 Capitol Mall, Third Floor
Sacramento, CA 95814
Telephone: (916) 322-7021

Counsel of Record for Appellee
Agricultural Labor Relations Board

#1450

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QUESTION PRESENTED

1. Is mere enactment of a state agricultural labor relations statute, which -- much as the original National Labor Relations Act -- permits labor organizations and employers to negotiate union shop agreements, sufficient governmental action to invoke constitutional scrutiny?

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EDITOR'S NOTE

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STATEMENT OF THE CASE

Appellant Severo Pasillas was an agricultural employee of Sun Harvest, Inc., a California grower under the jurisdiction of the Agricultural Labor Relations Act (ALRA or Act).[1/] In January of 1979, Pasillas' union United Farm Workers of America, AFL-CIO (UFW), called a strike against his employer. In June of 1979, despite offers of help from the union, he returned to work at Sun Harvest, Inc. during the strike, claiming economic necessity. In September of 1979, the UFW and Sun Harvest, Inc. reached agreement on a new collective bargaining contract which, like the previous contract, included a union security clause requiring membership in the union as a condition of employment. Such an agreement, termed a "union shop" and long permitted under California common law, is also

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1. The ALRA is found at California Labor Code section 1140, et seq.

permitted by California Labor Code section 1153(c).

UFW members, Pasillas' co-workers, brought charges against him for his strike breaking activities. Internal union disciplinary proceedings were commenced, but, even though he was notified, Pasillas chose not to attend. Nor did Pasillas thereafter avail himself of the internal union appellate procedures. The union trial committee's vote to expel him from the union was therefore unchallenged. Pasillas later filed charges with the Agricultural Labor Relations Board (ALRB or Board), but the Board dismissed the complaint for failure to exhaust internal union remedies. (Jurisdicitional Statement (J.S.), App. B, 46a-78a.)

Pasillas then sought review in the state Court of Appeal, pursuing his constitutional challenge to California Labor Code 1153(c). Upon review of the Board decision,

and of the various arguments raised by Pasillas in his constitutional attack on the statute, the Court of Appeal held that no governmental action was involved in the parties' inclusion of the union security provision in the UFW/Sun Harvest collective bargaining agreement. The Court of Appeal therefore rejected Pasillas' constitutional claims. (J.S., App. A, 15a-31a.)

ARGUMENT

Appellant Pasillas first argues that the state court was incorrect in finding that the mere enactment of the ALRA was insufficient governmental action to invoke constitutional scrutiny of privately negotiated union security agreements. Pasillas contends that merely because the statute exists, and provides for certain organizational rights and protections, the state is involved in every private collective bargaining agreement containing a union security clause. As more fully discussed

infra, what appellant overlooks is that, in order to find state action in the operation of a labor relations statute, this Court and several federal circuit courts have required that the statute itself be the source of the right to negotiate a union security agreement. For example, in the lead case of Railway Employees Dept. v. Hanson (1956) 321 U.S. 225, it was not enough that Congress enacted the Railway Labor Act (RLA), and that the statute permitted railways and unions to negotiate union security agreements. It was the fact that the RLA expressly overrode any contrary state law that convinced this Court that the RLA itself was governmental action; that was so because the statute was the sole source of the right to negotiate union security agreements. This was also the reasoning employed by the California Court of Appeal in analyzing the ALRA.

Appellant also argues that,

assuming state action, California Labor Code section 1153(c) violates his constitutional rights of association and equal protection. Appellee ALRB will not discuss this second issue in this preliminary motion, because the California Court of Appeal rested its opinion on a finding of no state action. Appellee will demonstrate, however, that the California Court of Appeal correctly analyzed the state action issue and that there is therefore no need for this Court to assume jurisdiction. The ALRB therefore urges this Court to summarily affirm the opinion of the California Court of Appeal in Pasillas, et at. v. Agricultural Labor Relations Board (1984) 156 Cal.App.3d 350. (J.S., App. A.)

I

THE COURT OF APPEAL CORRECTLY DETERMINED THAT NO STATE ACTION IS PRESENT IN THE EXISTENCE OF UNION SECURITY CLAUSES NEGOTIATED UNDER THE CALIFORNIA AGRICULTURAL LABOR RELATIONS ACT.

The Court of Appeal correctly

determined that California Labor Code section 1153(c) does not involve the government in the decision of a labor organization and an employer to negotiate union security agreements. In his argument to the state court, urging that state action be found, Pasillas argued only that (1) the Board, in an earlier administrative decision, had conceded state action; and (2) this Court's decision in Railway Employees Dept. v. Hanson (1956) 351 U.S. 225, and the First Circuit's decision in Linscott v. Miller Falls Co. (1st Cir. 1971) 440 F.2d 14 and a related line of cases require a finding of state action in the operation of the ALRA.

The California Court of Appeal succinctly and correctly rejected these arguments. The first of course does not present any possible federal question, and will not be discussed herein. The second argument ignores the fact that -- contrary

to the Railway Labor Act (RLA), the statute which was under consideration in the Hanson decision -- California Labor Code section 1153(c) is a "passive" statute, mandating nothing whatsoever. In this sense, the ALRA is identical to the National Labor Relations Act (NLRA).

On its face, the ALRA is couched in exclusionary language. That is to say, section 1153(c) does no more than state that, if an employer and a union agree to the inclusion of a union shop clause in their collective bargaining agreement, the law will not treat such a clause as an unfair labor practice. Such clauses, if agreed to, are exempted from the class of conduct which the ALRA elsewhere defines to be unfair labor practices.

But the significance of the exclusionary cast of the statute is not only in the fact that the statute does not compel anything. For if, prior to the enactment of

section 1153(c), the law in California prohibited union shop agreements, then section 1153(c) would represent an important change in law, authorizing such agreements where they had once been precluded.

However, the plain fact is that section 1153(c) did not change California law, and this is the deeper significance of the statute's passive character. Section 1153(c) merely declares that the law in California in existence prior to the enactment of the ALRA will remain unchanged by that Act. The statute, therefore, does not authorize union shop agreements so much as it clarifies that the pre-existing right of an employer and a union to enter into a union shop agreement is not altered by the statutory provision defining and prohibiting unfair labor practices, so long as the union involved is the duly certified representative of the employees.

For nearly 80 years, California has

permitted the union shop -- indeed, it has permitted even the "closed" shop. The ALRA merely continued in existence this long-standing state policy. And it is precisely because section 1153(c) did not change the law in this respect, and does not create new rights or obligations, that Pasillas' constitutional claims must fail. To invalidate section 1153(c) would effectively result in judicial legislation, prohibiting that which the California Legislature and the California courts have deliberately and consistently permitted: the union shop.

The ability of a union and employer to enter into a collective bargaining agreement providing for a union shop -- or even a closed shop -- has roots deep in California law. (See, e.g., J.F. Parkinson Co. v. Building Trades Council (1908) 154 Cal. 581, 598-600; Shafer v. Registered Pharmacists Union (1940) 16 Cal.2d 379, 387 ["The courts of this state have recognized the validity

of closed union shop agreements for more than thirty years"]; Gabaldon v. United Farm Workers Organizing Committee (1974) 35 Cal.App.3d 757, 766-768; Colgate-Palmolive-Peet Co. v. N.L.R.B. (1949) 338 U.S. 355, 361-362.)

The California Supreme Court has even affirmed a superior court's issuance of a preliminary injunction restraining breach of a collective bargaining agreement's union security clause. (Silva v. Mercier (1949) 33 Cal.2d 704 [complaint charged employer with improperly retaining workers who had failed to join the union.].)

In 1959, sixteen years before passage of the ALRA, the California Supreme Court expressly found that California law did not preclude union security agreements, so long as they were negotiated by a duly authorized collective bargaining representative of the employees. (Chavez v. Sargent (1959) 52 Cal.2d 162.)

In Petri Cleaners, Inc. v. Automotive Employees, Etc. (1960) 53 Cal.2d 455, the state Supreme Court reversed the Chavez limitation on union security clauses. In Petri, the state Supreme Court stated:

> We conclude that employers are not required by law to engage in collective bargaining and the closed or union shop agreements and concerted activities to achieve them are lawful in this state whether or not a majority of the employees directly involved wish such agreements. . . If a contrary rule is to be established, the Legislature, not this court, must enact it.

(53 Cal.2d at 474, 475; emphasis added; see also Messner v. Journeymen Barbers, Etc. International Union (1960) 53 Cal.2d 873; Englund v. Chavez (1972) 8 Cal.3d 572.)

It was against this background that the California Legislature in 1975 enacted the ALRA. Modeled after the National Labor Relations Act (NLRA), the ALRA creates a five-member quasi-judicial administrative tribunal to administer the Act's provisions. (Cal. Lab. Code, sec. 1141.) The ALRA

expressly vests agricultural employees with organizational rights.

The ALRA also defines certain forms of conduct as "unfair labor practices." Although the Act states that it will be an unfair labor practice for an agricultural employer, by any term or condition of employment, "to encourage or discourage membership in any labor organization", an exception was provided for union security agreements. (Cal. Lab. Code sec. 1153(c).)

By enacting Labor Code section 1153(c), the Legislature therefore merely codified existing state law governing the enforceability of union shop agreements. In essence, the ALRA did nothing more than limit the scope of California's previous "laissez faire" approach to the issue by restricting such negotiations to elected representative unions. Far from creating a union right to negotiate a union shop agreement, the Act limited the pre-existing

right, so as to ensure that the bargaining union has majority support among the affected employees.

Quite apart from the fact that California's long history of permitting union shop agreements was not materially altered by Labor Code section 1153(c), there is the fact that the statute is, in any event, permissive and not mandatory. This is the critical fact that appellant ignores, and it is the basis for the California Court of Appeal's determination that no state action exists in the operation of the ALRA.

The California situation stands in sharp distinction to that described in Railway Employees' Department v. Hanson, supra, 351 U.S. 225. There, the Supreme Court preliminarily noted that the union shop provision of the federal RLA was only permissive: " Congress has not compelled nor required carriers and employees to enter into union shop agreements." (351 U.S. at

231.) However, contrary to the law in California, the State of Nebraska had adopted a constitutional amendment prohibiting union shop agreements, whereas the RLA contained a provision permitting union security agreements notwithstanding the law of any state. The Hanson court concluded that, by virtue of the Supremacy Clause of Article VI of the United States Constitution, federal law superseded state law and made union security clauses permissible where they had been otherwise prohibited. This conflict was the source of governmental action which brought a constitutional dimension to the employees' objection to the contract: "If private rights are being invaded, it is by force of an agreement made pursuant to a federal law which expressly declares that state law is superseded. [Citations.] The enactment of the federal statue authorizing union shop agreements is the governmental action on

which the Constitution operates, though it takes a private agreement to invoke the federal section." (351 U.S. at 232; emphasis added.)

The same reasoning was used by the Supreme court in International Association of Machinists v. Street (1961) 367 U.S. 740, which involved a conflict between the Railway Labor Act and a Georgia "right-to-work" statute (see Machinists Association v. Street (GA 1959) 108 S.E.2d 796), and in Brotherhood of Railway and Steamship Clerks v. Allen (1963) 373 U.S. 113, each involving a conflict between the permissive federal provision and the prohibitive state law. It was precisely that conflict that provided the requisite governmental action necessitating the consideration of constitutional issues. But the same result does not necessarily obtain where no such conflict exists.

The most recent Ninth Circuit

holding on the issue is apparently Wicks v. Southern Pacific Co. (9th Cir. 1956) 231 F.2d 130, cert. den. 351 U.S. 946.[2/] There, the circuit court ruled that a statute which merely permits a union shop agreement does not supply the requisite state action to invoke constitutional restraints. Moreover, addressing California's particular situation, the court gave this analysis:

> It was pointed out in [Otten v. Baltimore & O. R. Co. (2nd Cir. 1953) 205 F.2d 58], that there "might" be a substantial constitutional issue if state law prohibited the union shop while the amendment of Congress permitted the union shop. But the Second Circuit found no substantial constitutional issue on this ground as New York law did not prohibit the union shop. Here again, these cases before us fall within the facts of the Otten case. California, like New York, permits union security agreements, including a form even more liberal than the so-called union shop, namely the "closed shop."

(231 F.2d at 136-137; emphasis in orginial.)

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2. Significantly, this Court denied certiorari in the Wicks case one week after its issuance of Railway Employees' Dept. v. Hanson, supra, 351 U.S. 225.

(C.f., Adams v. Southern Calif. First Nat. Bank (9th Cir. 1974) 492 F.2d 324, 328-329.)

This Court's recent decisions would seem to be consistent with the Ninth Circuit's Wicks reasoning. In Abood v. Detroit Board of Education (1977) 431 U.S. 209, this Court expressly declined to extend constitutional restraints to private collective bargaining agreements absent some additional showing of state action.

In Abood, appellant employees sought to distinguish the ruling in Railway Employees' Dept. v. Hanson, supra, 351 U.S. 225, which permitted dues collections form non-members, on the ground that, unlike the employer in Hanson, their employer was a public entity and should therefore be held to stricter constitutional standards. It will be remembered that, in Hanson, this Court found that union security clauses under the RLA did not violate the First or Fifth Amendments of the United States

Constitution; the appellants in Abood argued that a different result should obtain where the employer is the government. (431 U.S. at 226.)

This Court rejected appellants' efforts; state action, it ruled, is state action, whether that action results from the fact that the actor is the government itself, or from the fact that the actor acts pursuant to legislation. The Court noted that, in Hanson, the requisite governmental action was found in the fact that the union security provisions at issue would have been unenforceable but for the RLA's language expressly superseding conflicting state law. Having found state action, the Hanson Court nevertheless found no constitutional deprivation. No "greater" state action was provided by the facts in Abood, the Court held. (431 U.S. at 226.)

The majority's conclusion -- that its reliance on the Hanson constitutional

analysis of the union security clause did not depend upon the existence of a governmental employer -- drew sharp criticism from the dissent. The dissent read the majority's reasoning as holding "that the same constitutional constraints invariably apply when the government fosters or encourages a result in the private sector by permissive legislation as when it commands that result by the full force of law." (431 U.S. at 251, n. 5, conc. opn. of Powell, J.) Unlike the RLA, the Michigan statute at issue in Abood did not create the right to negotiate an agency shop agreement where such agreements were otherwise proscribed; like California's Labor Code section 1153(c), it merely provided that such agreements were not prohibited by state law. (See 431 U.S. at 214, n. 17.) It thus appeared to the dissent that the Abood majority had relied upon the Hanson analysis because, as in Hanson, the union security agreements at

issue were authorized by statute; Justice Powell would distinguish between permissive legislation and mandatory legislation.

The majority responded to the dissent's concern by expressly disavowing his construction of their reasoning. Hanson was applicable, the majority said, not because it found state action pursuant to the RLA, but because -- having found governmental action in the conflict between the RLA and the Nebraska statute -- the constitutional analysis of the union security agreement was relevant to the analysis in Abood:

> Nothing in our opinion . . . indicates that private collective-bargaining agreements are, without more, subject to constitutional constraints [citation to Justice Powell's opinion]. We compare the agency shop agreement in this case to those executed under the Railway Labor Act simply because the existence of governmental action in both contexts requires analysis of the free expression question.

(431 U.S. at 225, n. 23.)

Thus, this Court expressly eschewed

any suggestion that the result in Abood would have been the same whether or not the employer was a public entity. Indeed, in view of the vigor with which the majority answered the dissent's concern, it would not be unreasonable to conclude that the majority would have reached a different result had the employer been a private party operating under Michigan's permissive statute. It is thus true that the Abood court found no constitutional distinctions between the First Amendment rights of public and private sector employees; this is so, however, only when governmental action has resulted in a deprivation of constitutional rights to the private sector employee. Though governmental action was the source of the alleged deprivation in the Hanson case, it is not the source of Pasillas' grievance here.

In any event, the expressed and unequivocal disavowal by the majority in footnote

23 of the Abood decision makes abundantly clear that Abood is of no help to Pasillas in this case. And, although the Ninth Circuit has yet to comment on footnote 23, the Court of Appeal for the District of Columbia Circuit -- citing footnote 23 in Abood -- has expressly ruled that "the authorization for agency shop clauses provided by NLRA section 8(a)(3) does not transform agency shop clauses into a right or privilege created by the state or one for whom the state is responsible." (Kolinske v. Lubbers (D.C. Cir. 1983) 712 F.2d 471; see also Reid v. McDonnell Douglas Corporation (10th Cir. 1971) 443 F.2d 408.) The only contrary decision actually analyzing state action under the NLRA is Linscott v. Miller Falls Co., supra 440 F.2d 14. And, as the California Court of Appeal noted, the Linscott majority opinion issued before the 1977 Abood decision of this Court which made clear that the state action in

Hanson depended on the preemptive aspect of the RLA. The NLRA of course does not preempt any contrary state authority prohibiting union shops; it is a passive statute much like the ALRA.[3/]

CONCLUSION

There being no state action here, the sole issue in the underlying ALRB proceeding was whether the UFW's membership rule -- which requires union members to respect

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3. Pasillas also cites Ellis v. Brotherhood of Railway Clerks (1984) ___ U.S. ___ [104 S.Ct. 1883] for the proposition that this Court has decided the state action question. Ellis, decided under the Railway Labor Act, arose in California where, as noted, no conflicting "right-to-work" statute exists. The conflict noted in the Hanson case is therefore not present; this Court nonetheless addressed several constitutional issues. However, as the California Court of Appeal noted, neither the Ninth Circuit, which merely assumed the Hanson case applied, nor this Court actually addressed the issue of state action. Ellis does not therefore appear to be controlling on the issue. Furthermore, Pasillas' interpretation of the Ellis decision is at odds with a long line of previous federal authority, none of which was discussed in the Ellis opinion.

union picket lines -- is "reasonable" as contemplated by California Labor Code section 1153(c). This is obviously an issue of purely local concern, and one which the state administrative body and state courts have already addressed. In addition, since no state action is present, the California Court of Appeal did not find it necessary ~~reach appellant's other constitutional~~ issues. Appellee Agricultural Labor Relations Board therefore respectfully moves this Court to affirm the decision of the California Court of Appeal, First Appellate District in Pasillas, et al. v. Agricultural Labor Relations Board (1984) 156 Cal.App.3d 350.

Dated: December 5, 1984

Respectfully submitted,

DANIEL G. STONE
Solicitor of the Board
NANCY C. SMITH
Deputy Solicitor
CATHY A. CHRISTIAN
Deputy Solicitor

Counsel of Record